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IN THE

Supreme Court of the United States

October Term, 1966

No. 42

SWITZERLAND CHEESE ASSOCIATION, INC.
SCHWEIZERISCHE KAESEUNION A.G.,
Petitioners,

against

E. HORNE'S MARKET, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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Statement

In respect to the jurisdictional issue before the Court, Horne's brief (hereinafter H.B.) presents essentially four points:

1. Horne seemingly contends that Section 1292(a)(1) of the Judicial Code is inapplicable because, in Horne's view, the order appealed from is not interlocutory (H.B. 3, 4);

2. There is a substantial difference between interlocutory and permanent injunctions (H.B. 3, 4);

3. The position of the Court below against appealability is supported by Moore's *Manual on Federal Practice and Procedure* and by respondent's counsel (H.B. 3, 5); and

4. An appeal of the nature involved delays disposal of the case and increases the expense to the defendant (H.B. 3-5).

The points presented by Horne are dealt with below, with the exception of points 2 and 3 which do not merit consideration. Petitioners do not deny that preliminary injunctions differ from permanent ones. That Horne's counsel is in agreement with the position of the Court below is not surprising and that Moore's *Manual* expresses the same view is conceded.

Although not encompassed by the questions presented and thus not before the Court, Horne also discusses the substantive merits of petitioners' claim. Horne thus contends that since "Swiss cheese" is a generic designation and its Swiss-type cheese is imported from Finland, Horne is entitled to refer to its cheese as "Imported Swiss Cheese" without indicating the country of origin. In support of its allegation that the disputed designation is within the public domain, Horne refers to an advertisement placed by petitioners in U.S. publications.

Since Horne has not confined the scope of its contentions to the jurisdictional issue before the Court, but has argued the merits of the controversy and, in so doing, has in fact urged the Court finally to dispose of the action, it is deemed necessary to discuss at least the essential points of the substance of petitioners' case.

ARGUMENT

I

The order appealed from is interlocutory and Section 1292(a)(1) of the Judicial Code is therefore applicable.

Horne's contention that the order of the District Court is not interlocutory is the result of faulty reasoning. While petitioners' motion for summary judgment granting a permanent injunction sought a final adjudication of their claim, the denial of the motion resulted, of course, in an interlocutory order since it did not dispose of the substance of the action. An interlocutory order is not turned into a final one, merely because it is entered on a motion requesting a remedy which would be final if granted. The Court below expressly referred to the order as "an interlocutory denial of a permanent injunction" (R. 55, lines 15-22). Since Horne in its brief states that "Counsel for respondent agrees with everything in the opinion of the judges of the U.S. Court of Appeals, First Circuit (R. 55-56) and refers to that without repeating its contents" (H.B. 5), Horne's extraordinary and illogical contention is contrary to its own expressed view.

II

The danger of delay and added expense in summary judgment procedure is outweighed by the possibility for prompt disposal of the litigation.

The Advisory Committee on the Federal Rules (Advisory Committee Notes, Fed. R. Civ. P. 56) has defined summary judgment in a single sentence:

> "Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact".

If the summary judgment is granted by the district court, the defeated party can, of course, appeal under § 1291 of the Judicial Code, since the judgment is tantamount to a final decision. If the court of appeals reverses, the case goes back to the district court for trial. Ultimate delay and additional expense is consequently an intrinsic factor of summary judgment procedure, irrespective of whether the motion is initially granted or denied. This drawback, however, is by far outweighed by the possibility for prompt disposal of the litigation without trial. The trial of an action is the most expensive component of litigations and in view of congested court calendars, it takes normally a long time before a case is reached for trial.

As has been demonstrated in petitioners' brief, pages 19-22, there is no genuine issue as to any material fact in this case. Summary judgment procedure is therefore proper. Since the refusal of the permanent injunction in the case before the Court has a final and irreparable effect on petitioners' rights, the appeal, authorized as it is by the plain meaning of § 1292 (a)(1), is even more justified. If the appeal is sustained and the order reversed, the litigation is finally disposed of and Horne's misgivings in respect to delay and expense would be unfounded.

In essence, therefore, summary judgment practice is not a one way street. Had the District Court granted the injunction, Horne could have appealed and any complaints by petitioners in respect to delay and increased expense would have been to no avail.

III

The inherent and natural meaning of the designation "Imported Swiss Cheese" is cheese imported from Switzerland.

What meaning does the designation "Imported Swiss Cheese" convey to the ordinary person? The answer is plain and can be expressed no better than in the words of

the District Court as spoken during the hearing of the original motion, when the District Court made itself a spokesman for the ordinary cheese purchasing public:

> "Well, isn't it pretty well established that the words 'Imported Swiss Cheese' mean cheese made in Switzerland?" (R. 36) and
>
> "If I go to a restaurant and ask them for imported Swiss cheese, I expect—at least up until now I had expected—to receive cheese that was made in and imported from Switzerland." (R. 42)

The District Court's remarks are in conformity with the accepted rules of language and any reasonable and logical interpretation of the disputed designation. Considering the fact that the expression "Swiss cheese" includes the proper adjective "Swiss", the use of this adjective in conjunction with "Imported" necessarily conveys the primary meaning that the thing in question has been imported from Switzerland. This corollary is not disturbed by conceding that the term "Swiss Cheese" has acquired in the United States a somewhat generic meaning for a type of cheese. Horne itself had admitted that it specifies the country of origin in ordering its imported Swiss Cheese (R. 20, 23).

Whether one refers to the inherent meaning of the disputed designation as a *praesumptio hominis*, a different species of presumption or an inference, is merely an exercise in semantics. The simple truth remains that the average person understands the designation "Imported Swiss Cheese" to mean cheese which has been imported from Switzerland.

Horne's statement that "these three words are used truthfully" (H.B. 6) by it demonstrates that Horne employs a literal truth so as to render it deceptive in fact.

There is precedent for granting a permanent injunction enjoining the use of the trade designation "Imported Swiss

Cheese" for cheese which does not originate from Switzerland in the absence of an indication of the originating country. In *Schweizerische Kaeseunion Bern* v. *Saul Stark, Inc.*, 162 Misc. 485, 293 N. Y. S. 816, the Supreme Court of the State of New York enjoined the defendant

> "from using in connection with the words 'Swiss cheese' the word 'Imported' unless the name of the country from which the same is actually imported be also used in words or letters of equal prominence therewith."

Judge Steinbrink of the New York Supreme Court stated in his decision (at page 485 of 162 Misc.):

> "(O)ver a long period of time the words 'genuine imported Swiss cheese' have acquired a secondary meaning in the sense that they are associated in the minds of the public with a special type and quality of cheese imported from Switzerland. While the defendant, in offering for sale 'genuine imported extra fine quality Swiss cheese' expresses a literal truth, it nevertheless conveys to the public the impression that the cheese offered is imported from Switzerland. By quoting a price slightly higher than that quoted for domestic Swiss cheese and considerably lower than that for which Swiss cheese imported from Switzerland is generally sold, the defendant obviously intends to attract the public to what seems to be a good bargain. The result is not alone a diversion of purchasing power away from the Swiss cheese imported from Switzerland, but likewise an impairment of the reputation enjoyed by manufacturers of such cheese. This is the essence of unfair competition-deception practiced on the public to the detriment of those whose skill and energy have produced in their product a standard of quality found desirable by the consuming public."

It should be noted that, while the decision refers to "genuine imported Swiss cheese", the injunction also enjoined the use of "imported" in connection with the term "Swiss cheese". The decision is reproduced at R. 33.

The decision by the New York State Supreme Court has approvingly been cited in *California Apparel Creators* v. *Wieder of California,* 162 F. 2d 893, 898 (C. A. 2), certiorari denied 332 U. S. 816, from which the following statement is taken:

> "With the development of more far-flung business enterprises and the wider uses of advertising, it must now be recognized that newer forms of trade deceit may be developed where the literal language of the 'single source' rule may not adequately reflect the precedents. This seems particularly the case with reference to certain geographical names where through some combination of circumstances such a name may come to mean in the public mind not a single source, but a number, even though limited, of independent manufacturers or producers. Thus actions have been held maintainable for misrepresentation by appropriation of geographical names where products of the soil of certain localities were because of climatic or other natural advantages, superior to similar products of other localities (citing cases) or where producers of a particular region, using a peculiar patent or other special process, have produced a product of a single quality whose superiority is generally recognized." (citing cases, including *Schweizerische Kaeseunion Bern* v. *Saul Starck, Inc., supra.*)

IV

Horne's affidavits as to the meaning of "Imported Swiss Cheese" belie its own admitted conduct, since Horne specifies the country of origin when ordering foreign-made Swiss-type Cheese from its supplier.

Horne contends in its two affidavits (R. 33, 35) that the designation "Imported Swiss Cheese" means any foreign-made Swiss cheese. By contrast, Horne has admitted that in ordering foreign Swiss Cheese it specifies the country

of origin. This is clear from the transcript of Green's deposition (R. 23).

> "Q. When you ordered this cheese from this supplier, do you tell him to send you Finnish, as you just said, or Austrian Swiss Cheese, or do you tell him to send you imported Swiss Cheese? A. I either specify Finland or Austria.
>
> Q. That is, you ask him for the name of the country where that cheese supposedly originates? A. Yes, I believe I do that."

If Horne indicates the originating country of the cheese to its suppliers, why does Horne not do so in respect to the customer? The answer is obvious. Horne profits from the confusion created by deceptively selling less expensive non-Switzerland Swiss Cheese as "Imported Swiss Cheese."

Horne specifies the country of origin of the cheese to the supplier in order to get a cheaper cheese. To order "Imported Swiss Cheese" would defeat Horne's purpose because Horne would then be supplied with petitioners' more expensive Switzerland cheese which in turn would reduce Horne's profit.

V

Petitioners' advertisements are intended to educate and warn the public in respect to deceptive trade practices.

Horne contends that petitioners treat the designation "Imported Swiss Cheese" as within the public domain and supports its contention by referring to an advertisement that appeared in U.S. publications and which stated:

"Imported Swiss Cheese isn't good enough for you. Insist on genuine Switzerland Swiss cheese." (H.B. 8)

Horne's interpretation of this advertisement is an extraordinary exercise in sophistry. As a matter of fact,

the advertisement—and indeed Horne's contention—demonstrate the soundness of petitioners' position.

The advertisement in question is part of petitioners' campaign to combat unfair trade practices as adopted by Horne and a few other retailers. These retailers know that the inherent and accepted meaning of "Imported Swiss Cheese" is cheese imported from Switzerland. They also know that the general public, in asking for "Imported Swiss Cheese", expects to get the genuine product from Switzerland. Tempted by the lesser price of Swiss-type cheeses imported from other countries, such retailers attempt to hide behind the literal but deceptive truth that Swiss-type cheese imported from countries other than Switzerland is—literally—imported Swiss cheese and thus try to palm off the inferior and less expensive imported product to unsuspecting customers who ask for Imported Swiss Cheese.

The advertisement, as impliedly admitted by Horne, attempts to forestall these deceptive practices and to bar the specious protection of the literal truth, by urging petitioners' customers to ask for "genuine Switzerland Swiss". The unbiased reader of the entire advertisement will immediately get the message: Buyer beware! When you ask for "Imported Swiss Cheese" you expect to get "Switzerland Swiss," as you have the right to expect; but some retailers try to take advantage of you by palming off an inferior imported product. Thwart them. Ask for "genuine Switzerland Swiss", thereby making it more difficult for the retailer to cheat you.

The advertisement, couched in modern-day promotional phraseology, is thus predicated on the fact that "Imported Swiss" means "Switzerland Swiss" but that, in view of the unfair practices referred to, "it isn't good enough" to ask for "Imported Swiss" as the unsuspecting public may then not get what it intended to get. By referring to this advertisement, Horne in fact supports the soundness of petitioners' position.

VI

Horne's conduct is violative of the International Convention and Section 44 of the Lanham Act.

Both the United States and Switzerland are parties to the Convention for the Protection of Industrial Property of 1883, last revised at Lisbon in 1958, 13 U.S.T. 1; TIAS 4931.[1]

Article 1(2) of the Convention (P. B. 24) includes trade names and indications of source or appellations of origin within the scope of protection afforded by the Convention.

Article 8 (P. B. 24) states that trade names shall be protected in all member countries whether or not they form part of a trademark.

Article 10 bis (P. B. 24) provides that the member countries are bound to assure to nationals of countries of the Union effective protection against unfair competition. Unfair competition is defined as "any act of competition contrary to honest practice in industrial or commercial matters" and "all acts to create confusion by any means whatsoever with the establishment, the goods, or the industrial or commercial activities of a competitor." Particularly prohibited are "indications the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics . . . of the goods."

Section 44 of the Lanham Act[2] is entitled "International Conventions". The initial incentive for enacting section 44 of the Lanham Act was in fact founded on the

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[1] The pertinent sections of the International Convention and the Lanham Act are reproduced in Appendix A of petitioners' brief (hereinafter P.B.).

[2] Lanham Act of July 5, 1946; c. 540, 60 Stat. 427, 15 U.S.C. 1051.

desirability of implementing by domestic legislation those provisions of the International Convention under which the United States became obligated to provide effective legal protection against many different forms of unfair practices in international trade.

Section 44(b) (P. B. 26) implicitly refers to the International Convention and states that nationals of member countries are entitled to the benefits of Section 44.

Section 44(g) (P. B. 26) is essentially identical with Article 8 of the International Convention and specifically provides for protection of trade names or commercial names without obligation of filing or registration whether or not they form parts of marks.

Section 44(h) (P. B. 26) is similar to Article 10 bis of the International Convention and states that persons embraced by Section 44 shall be entitled to effective protection against unfair competition and remedies for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition. Injunctive relief is thus available under Section 44.

Finally Section 44(i) (P. B. 26) states that citizens of the United States shall have the same benefits.

It is thus evident that petitioner Schweizerische Kaeseunion has the right to invoke the protection of both the International Convention and Section 44 of the Lanham Act and that Kaeseunion's extended arm in the United States, to wit, petitioner Switzerland Cheese Association, is embraced by Section 44(i).

Both the International Convention and Section 44 of the Lanham Act specifically and expressly offer protection for trade names and commercial names "without the obligation of filing or registration whether or not they form parts of marks."

"Imported Swiss Cheese" is petitioners' trade name and indication of source or appellation of origin and, consequently, appellants are entitled to the relief sought, both under the Convention and Section 44 of the Lanham Act.

Although petitioners own a number of trademarks, it is submitted that no reliance on these trademarks has to be placed because according to the Convention and Section 44, trade names, commercial names and indications of origin are entitled to protection if unfair competition is involved. "Imported Swiss Cheese" is a commercial name and indication of origin owned by petitioners and it is evident that Horne has employed petitioners' designation in order unfairly to compete with them, the sole motive being profit. Since Swiss cheese made in Switzerland is of superior quality and of a higher price than the imitative cheese made elsewhere, it is obviously to Horne's advantage to advertise and sell its imitative cheese at a lesser price as "Imported Swiss Cheese", thereby attempting to mislead the public into believing that it is purchasing petitioners' superior product at such lesser price. This is clearly an incident of unfair competition and petitioners respectfully submit that they may invoke the protection offered by the Convention and the statute against such wrongful conduct on the part of Horne.

Horne, in its opposition to the original motion, has completely ignored this aspect of the case. The District Court, although admitting that the reliance on the Convention and Section 44 is a matter of law (R. 47-48), has seemingly not placed sufficient weight thereon.

The articles of the International Convention referred to above, which correspond in essence to Section 44 of the Lanham Act, clearly indicate that one of the purposes of the treaty is to permit nationals of member countries to enforce the same rights they possess in their home country in all the other countries of the Convention. Since peti-

tioner Kaeseunion could and does prevent persons in Switzerland from using the designation "Imported Swiss Cheese", the treaty, as embodied by the Lanham Act, is clearly applicable. In this context the attention of the Court is respectfully directed to *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F. 2d 633, 640 (C. A. 2) certiorari denied, 352 U. S. 871, where the treaty was discussed at some length.

> "In addition, the Convention sought to create uniformity in certain respects by obligating each member nation to assure to nationals of countries of the Union of effective protection against unfair competition. Thus a foreign national using his trademark in commerce in the United States is accorded extensive protection against infringement and other types of unfair competition by virtue of United States membership in the Convention." Cf. *Saxlehner* v. *Eisner and Mendelson Co.*, 179 U. S. 19, 36.

The provisions of the International Convention and of Section 44 of the Lanham Act have repeatedly been invoked by foreign litigants in this country in order to prevent domestic enterprises from unfairly competing and from reaping the benefit of the good will of famous trade names or designations of foreign origin. Reference is had to the decision in *Master, Wardens, etc.* v. *Cribben & Sexton Co.*, 202 F. 2d 779 (C.C.P.A.). This case involved an opposition proceeding to the registration of the mark "Sheffield" in the United States Patent Office by a U. S. company. The cutlery manufacturers in the City of Sheffield, England, had organized a governing body which had the sanction of the British government, in a similar manner as appellant Kaeseunion has been established pursuant to decree by the Swiss government. The governing body was, in fact, an agent of the British government and as such was the lawful guardian of the right to the exclusive use of the name "Sheffield" by the manufacturers of metal products in the City of Sheffield, England. The Court of Customs and

Patent Appeals ruled for the opposer and held that the American applicant was not entitled to registration of the mark "Sheffield". The Court stated that the 1883 Convention should be liberally construed and found that the Patent Office was bound under the treaty to recognize and give effect to the exclusive rights to the geographical name which had been established pursuant to English law.

Petitioners' position is also supported by the concurring opinion in *Rossman* v. *Garnier,* 211 Fed. 401, 409 (C. A. 8), where the Court stated as follows:

> "This may be said, however, that if the appellee could and did obtain French trademarks, as she swears she did in her affidavit for registration, then under article 6 of the treaty for the protection of industrial property of March 20, 1883 (25 Stat. 1376), to which both France and the United States were parties, *she would be entitled to protection in this country, whether or not we would have allowed such a mark* as an original proposition under our laws." (Italics supplied)

The issue involved in this appeal is very similar to that of the case *La Republique Francaise* v. *Schultz,* 57 Fed. 37 (C. C. S. D. N. Y.). In the case referred to the plaintiff was the Republic of France as owner of the waters which are marketed under the name "Vichy", Vichy being a district of France. The action was based on Article 8 of the International Convention of 1883 for the protection of "commercial names" in the same manner as the present petitioners invoke this section. The Court found that "Vichy" was a "commercial name" protected by Article 8 of the treaty. The Court should take due notice of the fact that Article 8 has been exactly reproduced in Section 44(g) of the Lanham Act.

Finally, petitioners should like to place reliance on the recent decision of the Second Circuit Court of Appeals in the case of *Community of Roquefort* v. *William Faehn-*

drich, Inc., 303 F. 2d 494, where the defendant, on motion for summary judgment, was enjoined from using the word "Roquefort" on sheep's milk blue-mold cheese unless the cheese originated from the municipality of Roquefort. Although this case was decided on other grounds in plaintiff's favor, the plaintiff did invoke the treaty.

VII

A descriptive trade name may be subject to exclusive control and ownership.

Horne contends that the designation "Imported Swiss Cheese" is not a trade name "but is purely descriptive" (R. 33, 35). Obviously, the meaning of "Imported Swiss Cheese" is descriptive of appellants' cheese but this fact does not render the designation incapable of being a trade name. On the contrary, the descriptiveness has significantly contributed to the fame and reputation of petitioners' trade name because Swiss products are generally known for their excellence.

As stated by Judge Johnson in *In Re Lyndale Farm*, 186 F. 2d 723, 726 (C. C. P. A.): "A trade name may be *descriptive*, generic, geographic, common in a trade sense, personal, firm or corporate" (italics supplied). Petitioners' trade name has acquired an overwhelming secondary meaning for cheese imported from Switzerland, primarily due to the descriptive nature of the trade name, the large quantities of superior cheese sold under the trade name in the United States during many decades and the exclusive control and supervision exercised by petitioners. (See *Schweizerische Kaeseunion Bern* v. *Saul Starck, Inc., supra*, where the secondary meaning of the designation is acknowledged.) Horne has not attacked petitioners' ownership and control of the designation but merely alleges a *non sequitur*, to wit, that descriptive words

cannot form a trade name. *"Roquefort"* is a descriptive trade name, but the use of this trade name on cheese not originating in the municipality of Roquefort was enjoined on a motion for summary judgment. *Community of Roquefort* v. *William Faehndrich, Inc., supra.*

VIII

To designate non-Switzerland cheese as "Imported Swiss Cheese" is a false designation of origin in the meaning of Section 43(a) of the Lanham Act.

Since the natural and obvious meaning of the designation "Imported Swiss Cheese" is cheese imported from Switzerland and since Horne has designated Finnish and/or Austrian cheese as "Imported Swiss Cheese", such designation is a false designation of origin or a false description or representation in the meaning of Section 43(a) of the Lanham Act (P. B. 25).

As the section provides that such a person

> "shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation,"

both petitioners are clearly entitled to relief under this statute.

There is no requirement in the statute for a showing that the geographical designation has acquired a secondary meaning. All that need be shown is that the use of this geographical designation by the defendant is false. (See Derenberg, *Federal Unfair Competition at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N. Y. U. L. Rev. 1029, 1044, 1957.) Since Horne's use of the geographical designation is "false" as a matter of law, it should be restrained from continuing to mislead the public.

"Imported Swiss Cheese" has, of course, acquired secondary meaning for appellants' cheese as stated in *Schweizerische Kaeseunion Bern* v. *Saul Starck, Inc., supra,* but Section 43(a) does not require proof of secondary meaning.

The attention of the Court is respectfully directed to *L'Aiglon Apparel* v. *Lana Lobell, Inc.,* 214 F. 2d 649. In this case the Court of Appeals, 3rd Circuit, decided a controversy in which the plaintiff dress manufacturer sued the defendant dress retailer for the injurious use of a picture of plaintiff's $17.95 dress in advertising defendant's $6.95 dress. The Court of Appeals held that, because of such misrepresentation, some trade was caused to be directed from the plaintiff to the defendant, while other trade was lost by the plaintiff as a result of the mistaken impression which was created, namely, that plaintiff was offering a $17.95 dress which, in fact, was worth only $6.95. The action was brought under Section 43(a) of the Lanham Act and the plaintiff prevailed.

It is well settled that if a word is used in connection with goods, in a sense other than its primary meaning, it is *prima facie* being used "falsely". Thus, when a company uses the words "Glass Wax" on a product which contains no wax, a *prima facie* case under Section 43(a) is established. (*Gold Seal Co.* v. *Weeks,* 129 F. Supp. 928 (D. C. D. C.), affirmed sub nom. *S. C. Johnson & Son, Inc.* v. *Gold Seal Co.,* 230 F. 2d 832 (C. A. D. C.), certiorari denied 352 U. S. 829.

In the "Glass Wax" case the Court stated at page 940 that plaintiff:

> "need not show that any false description or representation was wilful or intentional, need not prove actual diversion of trade (palming off, so to speak) . . . It means that wrongful diversion of trade resulting from false description of one's products invades that interest which an honest competitor has in fair business dealings—an interest which the courts should and will protect."

The primary and, indeed, the sole meaning of "Imported Swiss Cheese" is cheese which has been imported from Switzerland and, consequently, the use of the designation "Imported Swiss Cheese" in connection with cheese which does not originate from Switzerland is thus *prima facie* false.

CONCLUSION

For the reasons stated it is respectfully submitted that the order of the Court below should be reversed and that the case be remanded to the Court below for hearing on the merits of petitioners' appeal from the order of the District Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 42.—October Term, 1966.

Switzerland Cheese Association, Inc., et al., Petitioners, v. E. Horne's Market, Inc.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[November 7, 1966.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners brought this suit for trademark infringement and unfair competition under the trademark laws. 60 Stat. 427, 15 U. S. C. § 1051 *et seq.* They sought a preliminary injunction during the pendency of the action, a permanent injunction, and damages. After issue was joined, petitioners moved for a summary judgment granting a permanent injunction and awarding damages against respondent. The District Court could not say that there was "no genuine issue as to any material fact" within the meaning of Rule 56 of the Federal Rules of Civil Procedure which governs summary judgment and accordingly denied the motion. Petitioners appealed, claiming that order to be an "interlocutory" one "refusing" an injunction within the meaning of § 1292 (a)(1) of the Judicial Code, 28 U. S. C. § 1292 (a)(1).[1]

[1] That section provides:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

The Court of Appeals held that the order denying the motion for a summary judgment was not an "interlocutory" one within the meaning of § 1292 (a)(1) and dismissed the appeal for want of jurisdiction. 351 F. 2d 552. We granted certiorari because of a conflict between that decision and those from the Second Circuit. See, *e. g., Federal Glass Co.* v. *Loshin*, 217 F. 2d 936.[2]

Unlike some state procedures, federal law expresses the policy against piecemeal appeals. See *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176. Hence we approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders. It is earnestly argued however that, although this order denied a permanent injunction, it was nonetheless "interlocutory" within the meaning of § 1292 (a)(1) because the motion for summary judgment did service for a motion for a preliminary injunction (see *Federal Glass Co.* v. *Loshin, supra,* at 938) and that therefore "interlocutory" must also include a denial of a permanent injunction.

We take the other view not because "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the

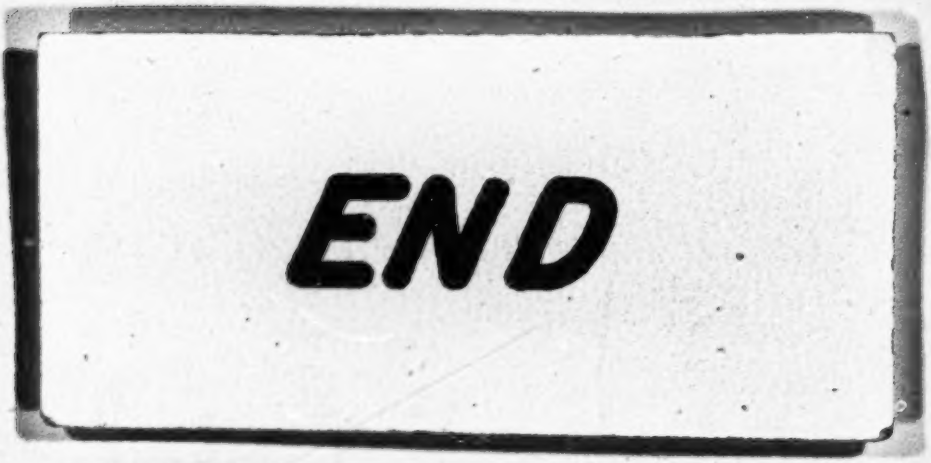
[2] Subsequent to the grant of certiorari in this case, the Second Circuit, *en banc*, reversed its position and held that such an order is not appealable. *Chappell & Co.*, v. *Frankel*, — F. 2d —.

meaning of § 1292 (a)(1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals.[3]

Affirmed.

MR. JUSTICE HARLAN would affirm the judgment below on the basis of the reasoning set forth in Judge Waterman's opinion for the Second Circuit in *Chappell & Co., Inc.* v. *Frankel*, — F. 2d —.

MR. JUSTICE STEWART concurs in the result.



[3] As Judge Charles E. Clark said in dissent in *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F. 2d 800:

"A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals." *Id.*, at 805, 806.